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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-857 and 78-997

NATIONAL LABOR RELATIONS BOARD

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Petitioners,

v.

YESHIVA UNIVERSITY

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE JOHNS HOPKINS UNIVERSITY, NEW YORK UNIVERSITY, NORTHEASTERN UNIVERSITY AND THE GEORGE WASHINGTON UNIVERSITY, *AMICI CURIAE*

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Interest of *Amici*

The *Amici*, The Johns Hopkins University, New York University, Northeastern University, and The George Washington University, are research-oriented, private institutions of higher education, each with a long-established and pervasive collegial decision-making process that properly places it in the rather limited category often referred to as "mature" universities.[1]

The John Hopkins University was incorporated in 1876 under the laws of the State of Maryland. It was the first academic institution in the United States to have as its primary goal the pursuit of graduate education. It maintains offices and educational facilities in Baltimore, Maryland and elsewhere.

New York University was incorporated by Act of the Legislature of the State of New York, Chapter 176 of the Laws of 1831, as thereafter amended. It maintains offices and educational facilities at locations in New York City and elsewhere.

Northeastern University traces its origins back to 1898 with the founding of the Evening Law School of the Boston Young Men's Christian Association. It has been known as Northeastern University since 1936. It maintains offices and educational facilities in Boston, Massachusetts and elsewhere.

[1] As the former Associate General Counsel of the American Association of University Professors noted, there is a wide spectrum among institutions of higher education in terms of faculty authority:

> "At the other end of the governance spectrum there are a number of institutions in which the faculty plays a significant, if not a determinative, role in the development of institutional policy. These commonly are regarded as the academically better institutions. More likely than not the majority of institutions fall somewhere along the spectrum represented by the powerless faculty of the autocratic or bureaucratic institution and the powerful faculty of the mature university and college." M. Finken, *Collective Bargaining and University Government*, 57 A.A.U.P. Bull. 149, 151 (1971) (footnotes omitted).

The George Washington University was chartered by Act of Congress in 1821. Its offices and educational facilities are located in Washington, D. C. and elsewhere.

While each campus has its own unique history and traditions, they share a common recognition of the integral role of faculty in their academic decision-making processes. Such faculty authority is evident in all aspects of their academic communities ranging from determination of academic matters (curriculum, admissions requirements, etc.) to effective decision-making in regard to what the National Labor Relations Board (hereinafter "NLRB" or the "Board") refers to in its industrial jargon as "working conditions". These consist, to a substantial degree, of perquisites unheard of in an industrial context and unique to faculty at such universities, such as collegially-governed academic tenure and promotions.

The decision-making process at such universities is carried out by various faculty governance bodies such as senates, faculty councils and various faculty committees. Implicit in the Court of Appeals' decision is recognition of the crucial importance of such faculty governance bodies for the continued vitality of mature universities where academic excellence can survive and grow. *Amici* contend that the Board's misapplication of industrial concepts to such universities would result in the effective destruction of their governance bodies and would be of substantial detriment to other important aspects of academic life. *See* pages 8-16 *infra*.

Question Presented

Was the Court of Appeals for the Second Circuit correct in holding that there was no valid basis in the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, for the Board's newly formulated legal doctrine for university faculty, upon which the Board predicated its denial of the Act's exclusions for faculty at a mature university with factually undisputed managerial and supervisory authority?

Statement of the Case

This case is before the Court on a writ of certiorari to the Court of Appeals for the Second Circuit which denied the NLRB's petition for enforcement of its order brought pursuant to Section 10(e) of the National Labor Relations Act (hereinafter the "NLRA" or the "Act"), 29 U.S.C. §160(e).[2] The order, dated August 24, 1977, in effect directed Yeshiva University (hereinafter "Y.U.") to engage in collective bargaining with its faculty. That order was based on a decision of the Board in a representation proceeding instituted by the Yeshiva University Faculty Association (hereinafter "YUFA") which decision contained the substantive findings of the Board at issue herein.[3]

[2] *NLRB* v. *Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *cert. granted*, —— U.S. ——, 99 S. Ct. 1212 (1979).

[3] *Yeshiva University*, 221 NLRB 1053 (1975).

(a) The Status of Faculty Collective Bargaining.

Amici are not aware of any "mature" private university that has a collective bargaining relationship with its faculty. Indeed, the vast majority of currently represented faculty are at two year colleges and public institutions.[4] Moreover, the court below indicated that only in those institutions where "faculty play a decisive role in the development of institutional policy" would the exclusion applicable to Y.U. faculty be theoretically applicable. Even within this very limited category, however, the court indicated a case by case consideration would be required. *See* 582 F.2d at 696. Indeed, only one other institution of higher education has argued before any Court of Appeals the managerial or supervisory status of its faculty and its claim was rejected. *NLRB* v. *Wentworth Institute*, 515 F. 2d 550, 556 (1st Cir. 1975). Accordingly, any suggestion that an affirmation of the Court of Appeals' decision in the instant case would widely disrupt on-going collective bargaining relationships is specious.

(b) Faculty Governance at Mature Universities.

At "mature" private institutions of higher education where collegial decision-making has long been the rule, such as the *amici* herein, there already exist on-going governance mechanisms in which faculty have a vital role. At certain institutions, separate governance mechanisms exist within the institution's individual schools while at others an inter-school governance mechanism, generally referred to as a senate, dominates. In addition, governance is also carried out through such mechanisms as faculty councils and faculty committees, such as Faculty Grievance Committees.

[4] The Chronicle of Higher Education 13-14 (June 25, 1979).

A brief description of such faculty governance mechanisms at the campuses of *amici* herein is illuminating. At The Johns Hopkins University, each school has its own governance body. For example, at the School of Arts and Sciences, there exists both an Academic Council and a General Assembly. According to the University's published rules, the Academic Council determines such matters as appointments and promotions of faculty, reviewing the recommendations of the department chairpersons and the Dean in these regards (Section 8 of Procedures of Academic Council). The General Assembly of the school is authorized by the By-laws "to provide a forum for the faculty to discuss and make recommendations concerning matters pertaining to the purposes and functioning of the University" (Article I, Section 2).

At New York University, according to the By-laws, the Senate is empowered to act upon "educational matters and regulations of the academic community that affect more than one school." As provided in greater detail in the University Faculty Handbook, the Senate "is the deliberative body of the University for academic policies, structure, and procedures, including proposals for changes; it is concerned with the academic program and structure, personnel and budgetary policies, development of facilities, and community, professional, and educational relations of the University" (N.Y.U. Faculty Handbook, 19).

At Northeastern University the functions of the Faculty Senate are defined as follows:

1. To act as a coordinating body to establish mutually satisfactory academic goals and standards among the various Colleges and Divisions.
2. To be consulted either as a whole body or in appropriate committee on all policies, proposals and problems of faculty concern, including such matters as

the creation of new colleges, new campuses, and new departments.

3. To initiate consideration and recommendation on any matter of faculty concern.
4. To undertake such legislative and advisory functions in connection with the work of the University as may be referred to it by the President and the Board of Trustees.
5. To provide communication between the Administration and University Faculty.

Northeastern University By-Laws 13-14.

At The George Washington University, one aspect of the Senate's authority is stated as follows in the University's Faculty Organization Plan:

> The University Senate [now known as the Faculty Senate] on behalf of the University faculty shall, with respect to matters which are of concern to more than one college, school or division or to University faculty generally:
>
> (1) Formulate policy and make such other determinations and exercise supervision with respect to such programs or other matters as the Dean or the Board of Trustees may designate.
>
> . . . .

The George Washington University, Faculty Organization Plan, Art. 3, Section 1.

While the scope of authority of such governance bodies is rather broadly stated in published documents, it should be noted that substantial additional authority exists in practice.

(c) The Harm Resulting From the Board's Proposed Application of the Act.

In a study of the effect of collective bargaining on governance bodies at unionized public and private institutions of higher education, it was found "that a union tends eventually to weaken the power of a Faculty Senate . . . ."[5] Indeed, scholars in the field have indicated that when a university community has been subject to collective bargaining for longer periods of time, Senates are not merely weakened but effectively destroyed. As one noted, [f]aculties cannot expect self-governance through academic Senates or similar vehicles to survive—at least as institutions of significance—if they opt for collective bargaining."[6]

The weakening, or effective elimination, of faculty governance bodies, as a result of the Board's current policy in regard to institutions where faculty play a crucial role in academic descision-making, has already been recognized by the Board. Thus, the Board has observed:

> The delegation by the University to such elected groups of a combination of functions, some of which are, in the typical industrial situation, normally more clearly separated as managerial on the one hand and as representative of employees interests on the other, *could raise questions both as to the validity and continued viability of such structures under our Act,* particularly if an exclusive bargaining agent is designated.[7]

[5] D. Reisman, Ed., Academic Transformations 425 (1973).

[6] D. H. Wollett (Professor of Law at the University of California at Davis), *Self-Governance and Collective Bargaining: Can They Co-Exist?* (paper delivered at National Center for the Study of Collective Bargaining in Higher Education, Baruch College, New York, April 12, 1973).

In one Board representation proceeding involving university faculty, the majority opinion took note that a communication had been received by the Board from faculty requesting clarification of the Board's position and quoted from such faculty communication as follows:

> "[W]e are in the dark as to the impact of an affirmative vote upon our collegial system with its shared governance arrangements." The letter further stated that "we believe that the Board will do a grave disservice to faculty members at our institution if it orders an election without providing the needed clarification. For examples, we must know the likely effect on the role of our committees on promotion, on our Faculty Senate and on other matters intimately involved with relationships of faculty to the University and to each other."[8]

Despite the recognized "concern of faculty members," two of the three members of the Board's panel simply ignored the issues, indicating that it was not its rule "to give advisory opinions."[9] The third member, however, was less reserved and noted:

> It has been long established that since an employer's obligation to bargain with a selected representative is "exclusive," it carries with it "the negative duty to treat with no other" . . .

[7] *Adelphi University,* 195 NLRB 639, 648 n.31 (1972) (emphasis added).

[8] *Northeastern University,* 218 NLRB 247, 249 (1975) (footnote omitted).

[9] *Id.*

> In my judgment this Board is statutorily required to apply the exclusive representative principle to those colleges and universities over which it asserts jurisdiction. Undoubtedly, this will affect the ability of faculty members to utilize existing governance structures in dealing with the administration over "rates of pay, wages, hours of employment, or other conditions of employment."[10]

In addition to the extant and potential harm to faculty governance bodies by virtue of the principle of exclusivity, such governance bodies would be subject to dissolution under the Board's present doctrines for application of the Act in the event that a § 8(a)(2) unfair labor practice charge was filed by any individual, whether or not an employee. Such a charge would lie against any group, however styled or constituted, "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[11]

Clearly a faculty senate which deals with many "conditions of work" for faculty would be subject to such a charge. Inasmuch as faculty senates invariably receive from the university material aid (such as use of the university's mails, provision of meeting space, etc.), they would undoubtedly be found in violation of § 8(a)(2) which considers the provision of material aid as illegal "assistance". Moreover, inasmuch as senates invariably invite or include deans and other university "officials", they would also likely be found illegally "dominated" under § 8(a)(2) as well. In that event, senates or other

[10] *Id.* at 256 (Member Kennedy, concurring in part and dissenting in part) (footnotes omitted).

[11] § 8(a)(2), 29 U.S.C. § 158(a)(2). The term "dealing with" is broadly defined. *NLRB* v. *Cabot Carbon Corp.*, 360 U.S. 203 (1959).

governance bodies would have to be dissolved as a matter of law.[12] It should be noted that this result could occur even in the absence of a collective bargaining representative so long as the faculty involved are deemed by the Board to be employees subject to the Act but could not occur in the event faculty are considered managerial or supervisory personnel.[13]

The potential dissolution of existing governance bodies, or even serious curtailment of their existing range and degree of authority, would have most unfortunate consequences for "mature" university communities. Indeed, the collegial decision-making process carried out largely through such governance bodies is an essential ingredient in a university's striving for academic excellence. Moreover, the extraordinary degree of faculty participation in governance at "mature" universities has served to nourish and enhance academic freedom by assuring that the rights of faculty members are well understood and protected at the university.

Clearly, anything comparable to the present degree of faculty participation in governance—and the benefits it brings—could not exist if the present collegial framework for decision-making at mature universities were replaced by an adversarial collective bargaining setting. Nor could such faculty participation continue to flourish if the governance-bodies through which it is exercised are curtailed. What must not be overlookd is that the losses that will result if the Board's misconceived doctrines are allowed to prevail would have a profoundly harmful effect on some of the nation's oldest and most important scholarly communities.

[12] *Carpenter Steel Co.*, 76 NLRB 670 (1948).

[13] Groups composed of managerial or supervisory personnel are not subject to § 8(a)(2) charges.

A related danger results from the fact that it is commonplace at "mature" collegially-oriented private universities for faculty members to sit on committees that play a significant role in the search for university officers, such as presidents and deans, as well as department chairmen. As the American Association of University Professors noted, the prevailing concept of university governance fully "expect[s] that faculty members will have a significant role in the selection of academic administrators, including the president, academic deans, department heads, and chairmen."[14] Such a system can only exist in a collegial, rather than a collective bargaining, atmosphere since no institution forceably and unnaturally divided into "labor" and "management" can suffer the selection of "management" by members of "labor". If the Board's new doctrines are imposed on outstanding private universities, the integral role played by faculty in choosing the leadership of these educational institutions and of directing and guiding the functions of such institutions will be destroyed by an adversarial structure neither intended for, nor suitable for, such campuses.

An example of the adverse effect on academic communities resulting from the NLRB's misconceived and misapplied doctrines was provided at the campus of a university that recognized a faculty union. Previous to the introduction of faculty unionization at Fairleigh Dickinson University, department chairmen, as the Board itself recognized, had the power and authority of statutory "supervisors". Indeed, the Board noted that among other powers "the record [prior to certification of the bargaining unit] clearly

[14] "Faculty Participation in the Selection and Retention of Administrators" (Statement prepared by the AAUP's Committee on College and University Government and adopted by the Council of the American Association of University Professors in November, 1974) (footnote omitted).

shows that department chairmen have substantial responsibility for the hiring of new faculty members and the retention of faculty members who have not yet attained tenure."[15] Such a system, however, could hardly withstand the effect of the NLRB's imposition of an adversarial structure and the Board recently reconsidered the Fairleigh Dickinson University situation, noting in the process: "We . . . find that the collective bargaining agreement between the parties has so changed the authority and responsibilities of the department chairpersons that they are no longer supervisors under the Act."[16]

The disruptive effect of such misconceived and misapplied doctrines can also fully destroy the "tenure" system which is central to both academic freedom and the integrity of the relationship between academes and leading institutions of higher learning. Thus, it is a basic labor law principle that all existing "contracts" affecting what the Board defines as "terms and conditions of employment" are subject to complete revision or revocation upon collective bargaining certification:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of . . . to limit or condition the terms of the collective agreement. . . .
>
> The purpose of providing by statute for the collective agreement is to supersede the terms of separate agreement of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. . . .

[15] *Fairleigh Dickinson University*, 205 NLRB 673, 675 (1973).

[16] *Fairleigh Dickinson University*, 227 NLRB 239, 241 (1976).

> But it is urged that some employees may lose by the collective bargaining agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones.[17]

There can be little question that the subject matter of job security, which is inextricably involved in tenure contracts, falls within the purview of "terms and conditions of . . . employment."[18]

As such, faculty tenure arrangements would be totally subject to the jeopardy of the bargaining process. Indeed, at one organized educational institution (The University of Bridgeport), the union has already demanded that tenured faculty who have not paid union dues pursuant to the union's agency shop requirement be terminated.[19]

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[17] *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 337-38 (1944) (footnotes omitted); *see also Typoservice Corp.*, 203 NLRB 1180, 1190 (1973).

[18] Section 1 of the Act, 29 U.S.C. § 151. Subjects of bargaining include termination, *Inland Steel* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948); changes in employee status, *Shamrock Dairy*, 119 NLRB 998, 41 LRRM 1216 (1957); and layoffs, *Michalik, d/b/a Service Metal Industries*, 96 NLRB 10, 28 LRRM 1477 (1951).

[19] An "agency shop" clause, which requires payment of union dues and initiation fees as conditions of continued employment, has full legal validity under Section 8(a)(3) of the Act.

While the elimination of private employment contracts in light of collective bargaining may be understandable and necessary in other contexts, the potential elimination of tenure rights which are essential to academic freedom is neither understandable nor tolerable.

The former President of the American Association of University Professors observed that the harm to collective bargaining in such situations went to the very heart of the academic structure:

> The process of collective bargaining itself, which has been gaining increased ground in higher education, raises problems even apart from the strike. In dividing the university into worker-professors and manager-administrators and governing boards, it imperils the premise of shared authority, encourages the polarization of interests and exaggerates the adversary concerns over interests held in common. In placing the professor in the position of bargainer seeking to exact his demands from the university's managers and owners, the process of collective bargaining heavily burdens the professor's role as primary governor of the educational enterprise. Moreover, the process itself as it functions tends to remit issues which faculty should themselves determine to outside agencies such as state and federal boards, arbitrators, and union bureaucracies. In addition, since unions rest on continued support of their constituency, the process becomes susceptible to essentially political rather than essentially academic decision-making.[20]

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[20] Kadish, *The Theory of the Profession and its Predicament*, 58 A.A.U.P. BULL. 120, 122 (1972).

In short, what is at issue in this proceeding is the continued viability of collegial decision-making that is essential to the maintenance of academic excellence in this nation's "mature" university communities, which are limited in number, but not in importance, to our country's academic, social and professional goals.

Summary of Argument

The Board has recognized that faculty of certain universities have substantial managerial and supervisory authority, yet the Board has arrived at four legal doctrines with regard to faculty that are the basis of the administrative determination that such faculty do not fall within the Act's managerial and supervisory exclusions.

1. The primary doctrine now advanced by the Board is that the faculty's managerial and supervisory authority is not exercised in the interest of the University as employer. Yet the Board's doctrine is essentially premised on the fact that faculty at certain universities have such vast authority that they establish the very policies which they then "effectuate". This doctrine is also a reiteration by the Board of its position rejected by the Court in *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc.,* 416 U.S. 267 (1974), to the effect that the managerial exclusion of the Act should be limited to those "closely aligned" with management.

Aside from its conflict with the statute and the case law, this doctrine is factually invalid at universities such as Y. U. where the interest of the faculty and the university are not divergent but "almost always coextensive." *NLRB* v. *Yeshiva University, supra* at 700.

2. The petitioner NLRB's brief also stresses the Board's doctrine that where professional employees are involved, the Board has a statutory option to grant or deny exclu-

sion, even when the professionals "are vested with significant managerial or supervisory responsibility." Brief for Petitoner NLRB at 31. The Act's exclusions are mandatory, however, and not left to administrative discretion. Moreover, the Board's criteria for applying its assumed option—suggesting its use only where the faculty's authority would result in "divided loyalty"—is yet another restatement of the "conflict of interest" limitation of the Act's exclusions rejected by the Court in *NLRB* v. *Bell Aerospace, supra.*

3. The Board doctrine that faculty authority can be dismissed because it is theoretically subject to the ultimate authority of the university's Board of Trustees is at odds with the express provisions of §2(12) of the Act which contemplates exclusions for those whose authority is to "effectively recommend" subject to the higher authority of others. The doctrine is also factually inappropriate to "mature" universities such as Y. U., where the Board of Trustees has regularly endorsed faculty recommendations.

4. The doctrine principally relied on in the Board's representational decisions—that faculty authority can be denied because it is generally exercised on a collective basis —has now been virtually abandoned by the Board and Y.U.F.A. and disavowed by *Amici,* undoubtedly in large measure, because the doctrine was in conflict with previous administrative and judicial decisions.

ARGUMENT

The Second Circuit Did Not Err In Denying Enforcement of the Board's Order Which Was Premised On The Board's Four New Doctrines For University Faculty Cases.

(a) Administrative Findings of Supervisory Managerial Authority.

The Board's decision in *Yeshiva University* made clear that the Board recognized that faculty at certain institutions had effective "authority" with respect to numerous "working conditions" of faculty, matters of university governance and the academic "product" of the institution. This authority would normally mandate that such faculty come within the statutory definition of "supervisory" personnel[21] as well as the even broader exclusion from the Act for "managerial" personnel.[22]

Thus, as summarized in the *Yeshiva University* decision, the Board recognized the authority of such faculty "with respect to hiring, promotion, salary increases, the granting of tenure and other areas of governance."[23]

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[21] "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Section 2(11) of the Act, 29 U.S.C. § 152(11).

[22] *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc., supra* at 277.

[23] *Yeshiva University, supra* at 1054.

Still other aspects of faculty authority were noted in previous Board decisions which the Board adopted by reference in the *Yeshiva University* decision.[24] Thus, the Board has also noted: "Faculty status, including appointment, reappointment, promotion, tenure, and dismissal, are also matters as to which the full-time faculty exercised power and responsibility."[25]

These administrative findings of faculty authority with respect to various "working conditions" would normally mandate a conclusion that faculty are supervisors within the meaning of the Act. The law is clear that actual or effective recommendatory authority with respect to any one or more "condition[s] of employment" mandates such status. *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F. 2d 1169, 1177 (2d Cir. 1968); *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949). Indeed, the Board has specifically referred to faculty authority at certain institutions as being "supervisory" in nature.[26]

The Board has also conceded that faculty at certain institutions have authority that would normally fall within the Act's exclusion for managerial personnel. Thus, the most basic requirement for the managerial exclusion is authority to "formulate, determine and effectuate management policies."[27] The Board's decision in *Yeshiva University* noted, albeit in typically cryptic form, that Y.U.'s

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[24] *Id.*

[25] *C. W. Post Center of Long Island University*, 189 NLRB 904, 905 (1971).

[26] *New York University*, 205 NLRB 4, 6 (1973); *Adelphi University*, 195 NLRB 639, 648 (1972).

[27] *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc., supra* at 276, 288.

faculty "participate in collegial decision-making"[28] which constitutes the policy-making process at the "mature" university. In fact, the Board has even referred to faculty at certain institutions as having "policy-making" authority.[29]

The Board has expressly affirmed that the authority exercised by faculty at certain institutions would, in the industrial context of the Act, require exclusion of such faculty: "In a college or professional school which has a shared or 'collegial' governance structure, certain functions which, in the context of an industrial plant are generally performed solely by management, are either shared with or entirely delegated to groups of faculty members."[30]

The Board has, in fact, acknowledged that such exclusions would be applicable to the faculty of Y.U. if the Act was applied as it had always been prior to the Board's relatively recent extension of jurisdiction to university faculty. Indeed, the court below noted that: "The Board acknowledges . . . that the activities of the full-time faculty at Yeshiva might suggest managerial or supervisory status in other contexts, but not in the case of an institution of higher learning."[31]

The Board, however, has fashioned four legal doctrines peculiar to University faculty cases to avoid the ineluc-

[28] *Yeshiva University, supra* at 1054.

[29] *C.W. Post Center, supra* at 905. *See also Adelphi University, supra* at 640 for examples of other matters as to which faculty at certatn institutions have policy-making authority.

[30] Advice Memorandum dated March 18, 1977 by Harold J. Datz, Associate General Counsel, Division of Advice, NLRB, in *Endicott College*, Case No. 1-CA-12171.

[31] *NLRB* v. *Yeshiva University, supra* at 697 n.13.

table conclusion of its administrative findings of faculty authority with respect to working conditions and formulations of policy at certain institutions. Those doctrines were rejected by the court below as not having a sound basis in the Act or a logical relationship to the facts at an institution such as Y.U. *N.L.R.B.* v. *Yeshiva University, supra* at 702-03. Accordingly, we now turn to an examination of the administrative background for the Board's doctrines.

(b) Administrative Background of Board Doctrines.

In its *Yeshiva University* decision, the Board justified its determination not to apply the Act's managerial and supervisory exclusion to Y.U.'s faculty on the following basis:

> At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act. . . .[32]

As indicated, the Board offered no basis or rationale in its *Yeshiva University* decision for the doctrines used to limit the managerial and supervisory exclusions of the Act. Rather than analyze its doctrines, the Board relied entirely on "its earlier decision."[33] The Board now asks for defer-

[32] *Yeshiva University, supra* at 1053, 1054 (footnotes omitted).

[33] *Id.* at 1054. The Board cited the following cases (in chronological order), *C.W. Post Center*, 189 NLRB 904 (1971); *Fordham University*, 193 NLRB 134 (1971); *Adelphi University, supra; University of Miami*, 213 NLRB 634 (1974); and *Northeastern University, supra.*

ence to its administrative expertise supposedly developed in its earlier cases. A short review of these earlier cases, however, demonstrates that the Board is not entitled to such deference inasmuch as the doctrines were not based on factual conclusions but rather on unsupported legal interpolations of the Act at odds with recognized factual realities at "mature" universities.

As to the Board doctrine that faculty authority is not being exercised in the interest of the employer, the Board's decision in *Yeshiva University, supra* cites the Board's brief which states that this doctrine has been "consistently" held to by the Board in its faculty representation decisions.[34] In fact, there is no reference whatsoever to this doctrine in either *C. W. Post Center, supra* or *Fordham University, supra* or in several other earlier decisions on faculty. The doctrine actually was merely alluded to in *Adelphi University, supra* and first enunciated by the Board almost four years after *C. W. Post Center* in its *University of Miami* decision, *supra* in late 1974. Yet, in none of those decisions, nor in any other NLRB representation decision, is there any factual validation from a case record, nor was any rationale for the doctrine offered in those decisions. As the Second Circuit indicated, the Board offered no support in its decisions for this doctrine but "simply advance[d] the conclusory statement." 582 F.2d at 700.

As to the Board's doctrine that the board has the right to include faculty despite factually conceded managerial and supervisory authority because they come within the Act's definition of professional employees (§2(11), 29 U.S.C. §152(11)), neither in its *Yeshiva University* decision nor in its prior decisions on faculty did the Board offer any rationale, any reference to previous administrative decisions or any legislative support for the doctrine. Indeed,

[34] Brief for Petitioner NLRB at 21.

as the Second Circuit decision noted, such Board treatment of university faculty is contrary to that accorded by the Board to "professionals" other than university faculty but is proffered by the Board absent any clear "legal justification for a different standard for university faculty." 582 F.2d at 697 n.13).

The Board's "collective authority" doctrine was, in fact, introduced in *C. W. Post Center, supra,* but that decision failed to offer the slightest justification or rationale. As the Second Circuit concluded:

> When the Board first announced this view in *C. W. Post Center of Long Island University, supra,* at 905, it did so without benefit of analysis, and without citation to pertinent administrative decisions, judicial precedents or legislative history. In *Fordham University, supra,* the Board repeated its conclusory approach to the problem. Finally, in *Adelphi University, supra,* the Board conceded that its position arose not from precedent but from its puzzlement in attempting to apply to the unique university governance structure terms which were "designed to cope in the typical organizations of the commercial world." (*Id.* at 698 n.14).

Kenneth Kahn was even more explicit: "The Board cites absolutely no precedent for this contravention [the "collective authority" doctrine] of the explicit terms of section 2(11) and rightfully so, since there is no citable precedent."[35]

Finally, as to the Board's "ultimate authority" doctrine, this was first enunciated by the Board in its *Adelphi University* decision, with the following comment:

[35] Kahn, *The NLRB and Higher Education: The Failure of Policy-making Through Adjudication,* 21 U.C.L.A. L. Rev. 63, 95 (1973).

> In this case, as in *Post*, the ultimate authority does *not* rest with the peer group but rather with the board of trustees. Thus, although the facts indicate that much respect is paid by the trustees to the recommendations of the collegial body, it is equally clear that the trustees reserve the ultimate authority for themselves.[36]

In fact, the Board had even noted elsewhere in its *Adelphi University* decision that the Board of Trustees had always accepted the applicable recommendations of the faculty body at issue.[37] The only other Board "rationale" with regard to the "ultimate authority" doctrine came in its *New York University* decision, *supra*, where again the Board admitted it was relying on the technical corporate structure while recognizing that in reality power largely rested in the hands of the faculty in many key regards.[38] In his analysis of the ultimate authority doctrine Kahn noted:

> Thus, the *NLRB's* reliance in *Adelphi* on the collegial model for its holding that college and university faculty members are not supervisors seems to be inappropriate. The Board's conceptual model is unrealistic and its use reflects the Board's lack of expertise in the educational field. It appears that the Board is truly confounded by the concept of shared authority which is present in colleges and universities.
>
> The Board's reliance on the supremacy of the Board of Trustees in *Adelphi* for its holding that the faculty members were not supervisors can also be

[36] *Adlephi University*, *supra* at 648 (emphasis in original).

[37] *Id.* at 647.

[38] *New York University*, *supra* at 5.

> criticized on a second ground. What the Board failed to realize is that almost all private colleges and universities are non-profit corporations. As such, they must abide by their state's corporation laws which require that final institutional authority be vested in a board of trustees. Thus, the NLRB will always find that the "trustees reserve the ultimate authority for themselves" when in practice, the trustees delegate most of their authority to the faculty and administration.[39]

This is the basis in law and administrative expertise for the four Board doctrines that are at issue in regard to the status of faculty at "mature" universities.[40] Each of these doctrines will now be examined in detail.

[39] Kahn, *supra* note 35.

[40] Thus the decisions cited by the Board for the proposition that its findings are entitled to deference are inapposite. None of the cases cited, *Ford Motor Co.* v. *NLRB*, No. 77-1806 (May 14, 1979); *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978); *American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411 (1978); *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962) (Brief for Petitioner NLRB at 44), even suggest that the Board is entitled to such deference when its role is one of essentially devising legal doctrines. This is especially so when such doctrines are those in the Board's industrial millieu where the Board's expertise is based. In this regard, the suggestion in the Board's brief that Congress, in passing the 1974 Health Care Amendments, "approved the Board's policy of asserting jurisdiction over other non-profit institutions, including educational institutions" (Brief for Petitioner NLRB at 44, 35 n.28) is misleading. In fact Congress in passing the Health Care Amendments never sanctioned the extension of the Board's jurisdiction to *faculty*, and none of the legislative passages cited by the Board in its Brief at 35 contain the slightest reference to *faculty*. Indeed, health care in-

(Footnote continued on following page)

(c) The Board's Doctrines at Issue.

(1) The Board's doctrine that faculty authority is not exercised in the interest of the employer is invalid as a matter of fact and law.

The Board's principal argument before this Court is to the effect that the factually conceded managerial and supervisory authority of the faculty at an institution such as Y.U. does not qualify for the Act's managerial and supervisory exclusions because such authority is exercised on the faculty's own behalf. This, the Board assumes, must mean such authority is not in the interest of the university as employer.[41] The court below found substantial fault with the Board's approach, particularly in the factual circumstances of an institution such as Y.U. See *NLRB* v. *Yeshiva University, supra* at 700-01.

In analyzing this doctrine, one must realize that the Board is not suggesting that faculty at an institution such as Y.U. are less dedicated to the institution's interests than industrial-type management, nor is the Board even remotely suggesting that such faculty have less authority than industrial management. Rather, the new doctrine is premised on the Board's factual finding that faculty of a "mature" institution have a substantially more significant and more pervasive role in the management of the employer's enterprise, here the University, than individuals routinely excluded as managerial employees in an industrial setting.

(Footnote continued from preceding page)

stitutions as defined by the Board exclude any teaching operation involving faculty, or any other institution whose "primary purpose, its raison d'etre—is to train . . . and to promote research . . ." *Albany Medical College,* 239 NLRB 106; 100 LRRM 1279, 1280 (1978).

[41] Brief for Petitioner NLRB at 38-40.

Thus it is precisely because the faculty are the primary determinants of the employer's policies that the Board can suggest that the faculty's authority to "effectuate" those policies should be considered as authority exercised, not in the interest of the employer, but rather only in the faculty's own interest.[42] In that same vein, the Board's syllogism for its interest of the employer argument, namely, that faculty are not "aligned in interest with management" is deduced from the basis of a factual situation at Y.U. such that the faculty "substantially and pervasively operate the enterprise."[43] Likewise, the Board syllogism that faculty are not "expected to conform to management's policies" is, in reality, premised on the fact that "the faculty is the school."[44]

In point of fact, it is a tortured construction of the Act to suggest, as the Board does, that individuals with admitted authority to determine such matters as how the employer-university operates (by virtue of the faculty's recognized authority in regard to policy-making and "university decision making"); what the university's operations are to consist of (by virtue of their authority regarding curriculum and admissions); who is to operate the entity (by virtue of their authority over faculty hiring and tenure); and under what terms and conditions of employment (by virtue of their authority over salary and promotion of faculty), are not acting in the interest of the university as employer. *NLRB* v. *Yeshiva University,*

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[42] *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc., supra* at 273. *See* Brief for Petitioner NLRB at 23, 32.

[43] *NLRB* v. *Yeshiva University, supra* at 698. *See* Brief for Petitioner NLRB at 23.

[44] *NLRB* v. *Yeshiva University, supra,* at 700, quoting testimony in the repesentation proceeding at *Yeshiva University,* 2-RC-16662. App. at 379. *See* Brief for Petitioner NLRB at 32.

supra at 698. Were the same doctrine to be applied in an industrial context, it would yield the absurd result of denying the applicability of the managerial exclusion to every company's chief executive officers, its president and its board of directors since in an industrial context it is they who have primary responsibility for establishing the policies they are involved in "effectuating." Their authority, therefore, could also be dismissed as being exercised in their own interest, rather than in a "separate" employer interest.

Moreover, the Board's "interest" doctrine is at odds with established case law. Thus, in its *Textron* decision, the Court struck down a Board limitation of the Act's managerial exclusion only to those "so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on one hand and his fellow workers on the other." *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc., supra* at 273. Rather, the Court fully endorsed the Circuit Court's approach of recognizing the statutory exclusion of additional managerial personnel including those not "so closely related to or aligned with management" but nevertheless involved in "formulating, determining and effectuating his employer's policies or his discretion, *independent of an employer's established policy,* in the performance of his duties." *Id.* (citation omitted and emphasis added). Yet, with regard to faculty involved in "formulating, determining and effectuating" their employer-university's policies, the Board would again limit the managerial exclusion only to those with "a close identification and alliance with management."[45]

Even if the Board were statutorily empowered to arrive at novel legal interpolations of the Act, such a doctrine as here developed by the Board would necessarily fail on a factual basis at a "mature institution" such as Y.U.

[45] Brief for Petitioner NLRB at 28.

Thus, the Board's doctrine is entirely based on the presumption that the interest of the faculty and the interest of the University are necessarily divergent; yet, as the court below noted, there was not the slighest basis cited in the lengthy record of the *Yeshiva University* case for that presumption. *NLRB* v. *Yeshiva University, supra* at 700. Rather, the evidence established that, at an institution such as Y.U., "the interests of the faculty and the interests of the University were almost always co-extensive." *Id.* For the Board's doctrine that faculty are not acting in the interest of the employer to be meaningful, the interest of what in industry is referred to as the management or administration, must be clearly separate from and different than the interests of what would be referred to as the entity's laborers. In a "mature" university, however, the administration and the faculty are recognized as being united in a "joint enterprise" with the faculty and the administration of the entity exercising "joint authority".[46] In fact, the Board's Brief admits that in another regard "faculty members and administration *jointly participate* in the running of the educational entity" under a system of "shared authority."[47] Surely, to "dichotimize those interests" is, as the Court of Appeals suggested, "a strained, artificial separation." *NLRB* v. *Yeshiva, supra* at 701.

What the Board could not previously fathom, and now chooses to misconstrue, was recognized years ago by Justice Cardozo, namely that a university really consists of "a

[46] *See* Statement on Government of Colleges and Universities, 52 A.A.U.P. Bull. 375 (1966), cited in *NLRB* v. *Yeshiva University,* 582 F.2d at 701.

[47] Brief for Petitioner NLRB at 37 (emphasis added). The statement in the Board's Brief is the first known acceptance by the Board of the existence of such "shared authority" at "mature" universities.

company of scholars". *Hamburger* v. *Cornell University*, 240 N.Y. 328, 336-37 (1925). For the Board to distinguish between the interests of the scholars and the interests of the educational entity is meaningless and therefore factually, as well as legally, invalid.

(2) The Board's doctrine that the Act gives the Board the right to include professional employees with managerial and supervisory authority is erroneous as a matter of law.

The Board's approach in its *Yeshiva University* decision was to note that faculty are "professionals" within the meaning of §2(12) of the Act,[48] and to suggest, as a legal principle, that where "professionals" are involved, the Board had the statutory right to deny exclusion despite recognized managerial and supervisory authority.[49]

While no one takes issue with the Board's definition of faculty as "professionals" under the Act, what is at issue is the Board's legal interpretation of the Act to the effect that "professionals", even when "vested with significant managerial or supervisory responsibility", need not be excluded.[50] As the Board would have it, in such situations the Board "may" exclude, but is not statutorially required to do so.[51] It might be noted, however, that the statute does not limit, and has never before been

[48] 29 U.S.C. §152 (12).

[49] Brief for Petitioner NLRB at 31-32.

[50] *Id.* at 31.

[51] *Id.* at 31-32 n. 26.

interpreted in any court to limit the mandatory nature of the managerial and supervisory exclusion to non-professionals. The Board's basis for its apparently newly discovered legal principle is, in total, three recent *Board* decisions.[52]

Yet, the citation of recent Board cases as the sole basis for such a statutory principle amounts to little more than a "bootstrap" type of justification, particularly where the principle is at variance with the wording of the statute and all previous case law. It should be added that the Board decisions cited involved only individuals who were in no sense comparable to faculty involved in institutional policy-making and determination of important "terms and conditions of employment" of their colleagues.[53]

Moreover, underlying the Board's view of its statutory authority is once again the Board's premise that it can limit the exclusion of professionals who possess managerial and supervisory authority to only those professionals who, as potential members of a collective bargain-

[52] *Id.* citing *Presbyterian Medical Center*, 218 NLRB 1266, 89 LRRM 1752 (1975); *General Dynamics Corp.*, 213 NLRB 851, 87 LRRM 1705 (1974); *University of Chicago*, 205 NLRB 220, 83 LRRM 1678 (1973), *enforced* 506 F. 2d 1402 (7th Cir. 1974).

[53] In *Presbyterian, supra*, the Board was dealing with registered nurses who rotated on occasion as team leaders but who had no responsibilities other than "coordinating". In fact, in that same case, the Board found that a professional who "effectively recommends" any terms and conditions of employment was excluded (re: head nurses). 89 LRRM at 1755. In *General Dynamics, supra*, the Board denied the exclusion to engineers involved in "technical decisions which are not discretionary." 87 LRRM at 1715. And, in *University of Chicago*, the Board in fact found all professionals with supervisory authority to fall within Section 2(12) of the Act, 29 U.S.C. §152(12). 83 LRRM at 1681.

ing unit, would have a "divided loyalty if subjected to unionization."[54] (Brief for Petitioner NLRB at 32.)

It should also be noted that while "professionals" in industry who possess managerial or supervisory authority are regularly excluded by the Board, in a university such as Y.U., faculty have substantially greater authority.[55] As the Second Circuit noted (at 698):

> "However, the issue as we perceive it in this case involves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather, the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including, *inter alia*, the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. When faculty members have such power—as the record indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise."

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[54] The Board's Brief suggests that "the touchstone for managerial status is a close identification and alliance with management . . ." Brief for Petitioner NLRB at 28 (citing two Board decisions and a Circuit decision prior to *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc.*). No mention is made that in *Textron*, this Court rejected a limitation of the managerial exclusion only to those "so closely related to or aligned with management as to place the employee in a position of conflict of interest . . ." *Textron, supra* at 273.

[55] *NLRB* v. *Yeshiva University, supra* at 698 (citing Kahn, *supra* at 68).

(3) The Board's doctrine that faculty authority can be dismissed because it is theoretically subject to the ultimate authority of the University's Board of Trustees is contrary to the express provisions of the Act and factually invalid.

The Board's third doctrine for faculty would disregard conceded managerial and supervisory authority because such authority is theoretically subject to the ultimate authority of the University Board of Trustees.[56]

In the first instance, this doctrine is in direct conflict with §2(11) of the Act, 29 U.S.C. §152(11), which mandates exclusion for individuals who "effectively recommend", not merely those who pass on the recommendations. As the Second Circuit observed: "Obviously . . . the section contemplates a review by some higher authority." *NLRB* v. *Yeshiva University, supra* at 701-02.[57]

Aside from its legal incapacities, however, the Board's "ultimate authority" doctrine is entirely unrealistic. Even in an industrial context, as the Court noted, such a limitation would eliminate the Act's supervisory and managerial exclusions; in fact, the Board has routinely acknowledged, in industrial cases, the supervisory and managerial status of various officers and employees despite the fact that all corporate personnel are subject to the "ultimate authority"

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[56] Brief for Petitioner NLRB at 37.

[57] The Court also pointed out that a long line of judicial decisions have made clear that authority "subject to review by those others who, in fact, have the final power" nonetheless requires supervisory exclusion under the Act. 582 F.2d at 702 (*citing NLRB* v. *Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1177 (2d Cir. 1968)). *See also Eastern Greyhound Lines* v. *NLRB*, 337 F.2d 84, 86 (6th Cir. 1964); *NLRB* v. *Gary Aircraft Corp.*, 368 F.2d 233 (5th Cir. 1966); *NLRB* v. *Southern Airways Co.*, 290 F.2d 519 (5th Cir. 1961).

of every corporation's Board of Directors. *Id.* at 701. Moreover, as the Court observed, at a university such as Y.U., the fact was that the Board of Trustees regularly gave its routine endorsement to the faculty's recommendations.[58]

(4). The Board's previous doctrine that faculty authority can be dismissed because it is generally exercised on a collective basis is contrary to Board and Court decisions.

The Board's concept of disregarding faculty authority because it is generally collectively exercised, which was the primary doctrine originally relied upon by the Board in its faculty representation decision,[59] appears to have been quietly abandoned by the Board and by YUFA. *Amici* such as the AAUP firmly disavow the doctrine on which the Board primarily relied in all its faculty representation decisions.

> We do not, of course, contend that 'managerial' status depends on unilateral decision-making authority, or that participation in management decision-making may not result in such status. To be sure, corporate executives, and other plainly 'managerial' personnel, do not always possess such unilateral authority. Management decisions are increasingly made by groups of people each of whom is simply a participant in the process. (AAUP Brief at 13)

Inasmuch as the petitioners have apparently deferred to the Second Circuit's invalidation of this previously key Board doctrine, no further discussion appears appropriate beyond a reference to the relevant portion of the Court of Appeals opinion, *NLRB* v. *Yeshiva Uviversity,* 582 F.2d at 698-700, which lists Board as well as Court decisions excluding individuals whose authority was also exercised only collectively.[60]

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[58] *NLRB* v. *Yeshiva University, supra* at 702.

[59] *C.W. Post Center, supra* at 905.

[60] Citing *Florida Southern College,* 196 NLRB 888, 889 (1972); *Western Saw Manufacturers Inc.,* 155 NLRB 1323, 1329 n.11 (1965); *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc., supra* at 270.

CONCLUSION

For the reasons stated herein the petitions should be denied and the decision of the Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

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